2013 IL App (1st) 113764-U

FOURTH DIVISION
December 12, 2013

No. 1-11-3764

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 21020
	)	
ARTURO PEREZ,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: The evidence was sufficient to establish defendant committed an act of sexual penetration by intrusion, where examination of child revealed redness to the inner part of her vagina, blood matching defendant's DNA profile was found on the child's underwear, and the child testified that defendant woke her and assaulted her.

¶ 2 Following a bench trial, defendant Arturo Perez was convicted of predatory criminal sexual assault of a child and sentenced to 25 years in prison. On appeal, defendant challenges the sufficiency of the evidence to support his conviction, asserting that the State failed to prove he committed an act of sexual penetration. We affirm.

¶ 3 Defendant was charged with 10 counts of sex offenses committed in 2009 against M.V., a six-year-old girl, which were alleged to have occurred when defendant attended a party at the home of M.V.'s mother, Janette Hernandez. Before and during defendant's trial, the State nol-prossed counts 7 through 10 of the indictment, which were one count of aggravated criminal sexual abuse and three counts of criminal sexual abuse.

¶ 4 The remaining six counts against defendant included two counts of predatory criminal sexual assault of M.V. based on the following conduct: committing an act of sexual penetration by contact between his hand and her vagina (count 1), and committing an act of sexual penetration by inserting his fingers into her vagina (count 2). Defendant also was charged with four counts of criminal sexual assault: committing an act of sexual penetration by contact between his hand and her vagina knowing M.V. was unable to give knowing consent (count 3); committing an act of sexual penetration by inserting his fingers into her vagina knowing she was unable to give knowing consent (count 4); committing the act described in count 3 knowing she was unable to understand the nature of the act (count 5); and committing the act described in count 4 knowing that she was unable to understand the nature of the act (count 6).

¶ 5 At trial, Harvey police officer Ramon McAlpine testified that at about 9:30 a.m. on July 19, 2009, he was called to Hernandez's home at 15617 South Union in Harvey. Hernandez told the officer that M.V. told her she had been touched on her vagina and her back. McAlpine did not interview M.V.

¶ 6 After speaking with Hernandez, McAlpine went to the child's bedroom and observed a blanket and a child's shirt and skirt that were spotted with blood. McAlpine proceeded to a separate basement apartment in the residence where he observed "dried-up blood" on the wall and on a refrigerator. McAlpine approached defendant near a basement bedroom and observed dried blood on defendant's left hand.

¶ 7 Hernandez testified that in July 2009, she lived in the upper part of the residence with her boyfriend and her two children, including M.V. Defendant lived in the basement apartment. On July 18, Hernandez and her boyfriend invited several family members and friends, including defendant, to a party. Hernandez stated the men were in the garage and yard during the party.

¶ 8 Hernandez testified M.V. had gone to bed at about 1:15 a.m. When the party ended at about 2 a.m., Hernandez was cleaning up and found defendant in the garage "acting a little bit crazy." Hernandez said defendant showed her that he had cut himself on his right hand. She also said defendant told her that nobody liked him.

¶ 9 Hernandez returned to her residence and later saw defendant in the corner of her living room near her TV. She testified that defendant was on his knees with "both hands trying to cover his face." Hernandez said she was "shocked that he was there" but thought defendant was "just playing around with me." Hernandez asked defendant what he was doing, and defendant got up. She offered defendant leftover food from the party, and defendant ate the food. She noted a bandage on his hand was soaked with blood. As Hernandez put the plate away, defendant spanked her on her rear and pulled on her hand, telling her to "come here" and "you know you want some." Hernandez got mad at defendant and told him to leave, and Hernandez went to bed.

¶ 10 Hernandez testified that at about 6 a.m., M.V. got up from bed and asked where her underwear was, saying she did not have it on. Later that morning, M.V. said "my poppy's friend took it off." M.V. referred to the man as "Burrow," which Hernandez said was defendant's nickname. Hernandez asked the child if she was sure that defendant touched her and took off her underwear, and M.V. replied yes. Hernandez went to defendant's apartment door and knocked, but no one answered. She returned to her residence and asked M.V. where she was touched, and the child replied her vagina.

¶ 11 Hernandez called police and accompanied M.V. to the hospital, where she was present when the child was examined. Hernandez said the child's underwear was on but both of her legs were in one leg opening. M.V.'s clothing and bed cover were entered into evidence.

¶ 12 On cross-examination, Hernandez said she drank alcohol during the party and went to bed at 8 a.m. She, her boyfriend and a relative were in the kitchen from 2 a.m. to 8 a.m. When Hernandez saw defendant in the living room crouching near the TV, her boyfriend and the guests were in the garage. Hernandez said she was in the kitchen and living room during the entire party and could see the entire apartment from the kitchen. She and her daughter shared a bedroom. Hernandez saw defendant in the garage with her boyfriend when the party began. Hernandez said she had known defendant for about a year as a friend of her boyfriend and that defendant had never watched or babysat her children.

¶ 13 According to Hernandez, M.V. said she was tired and went to bed at about 1 a.m. and she saw M.V. sleeping in bed at about 2:30 a.m. Defendant was bleeding on his right hand when she saw him in the garage at about 1:30 a.m. She told defendant to wash his hand and go to sleep. Hernandez said she stayed in the garage for six or seven minutes before returning to the house. When she returned to the house, the bedroom door was closed. Hernandez walked around collecting trash from the party and, at that point, saw defendant in the living room.

¶ 14 After Hernandez spoke to M.V. in the morning, she noticed drops of blood on the floor. Hernandez stated as follows:

> "I just – she told me right away. I didn't put no words on her or no names on her for her to say that it was this guy or nothing. In her own – she started saying that it was poppy's friend, Burrow.

> So I was just – right away when she said that, I seen blood. It was right away that I knew it was him. I'm like – I had seen my – I was there when he [was] showing me that he had his hands cut.
>
> Nobody [] else from the guys [] had any blood on them. They were not hurt in any way. So I right away knew that it was him. My daughter kept on saying that it was Burrow, poppy's friend. So I believed my daughter I also told her.
>
> She said in her vagina. I told my daughter [to say the proper word] like vagina. So I believed my daughter. So everything came out that it was him."

¶ 15 Hernandez said she had a couple of beers that night but was not drinking at 2 a.m. Defense counsel asked Hernandez again about M.V.'s statements, and Hernandez said she told her daughter to tell her the truth, "so she kept on saying, yeah, mommy. I was like where did he touch you. She said in my vagina he was touching me."

¶ 16 The State called M.V. as a witness, and the court questioned the child, who was eight years old at that time, and deemed her competent to testify. M.V. stated that she went to sleep by herself the night of the party and that her mom and dad were in the kitchen. She stated that Burrow woke her up and told her to keep quiet. When asked what happened next, M.V. stated, "He touched me." The prosecutor asked where he touched her, and she responded, "My vagina." When asked how many times he touched her, she stated, "A lot." She went back to sleep afterward. M.V. stated Burrow lived "downstairs in the basement." The next morning, M.V. told her mother what happened.

¶ 17 On cross-examination, M.V. said her mom and dad were talking and drinking beer when she went to bed. She did not know how long she had been asleep when she saw Burrow. She

did not come out of the bedroom after Burrow was with her. When she woke up, her mother was in the bedroom in her own bed. M.V. said she asked her mother where her underwear was and told her mother it "was Burrow" and that she was the first to say Burrow's name.

¶ 18 M.V. said Burrow took her underwear. When asked if Burrow carried her into the house that night, M.V. responded he did not. M.V. stated she did not leave the house with her mom before the party and was not in the garage that night.

¶ 19 The parties stipulated that Nancy Healy, a registered nurse and certified sexual assault nurse examiner, examined M.V. on July 19, 2009. Healy's written report stated the nurse observed redness to the child's vagina, noted as the inner labia majora, as to both the right and left tissue. The report noted the child's hymen was not torn or lacerated. The parties also stipulated that human blood was detected on M.V.'s underwear and its DNA profile matched that of both M.V. and defendant.

¶ 20 At the close of the State's case-in-chief, defense counsel moved for a directed verdict. As to several of the charged counts, including count 2 (predatory criminal sexual assault of a child via sexual penetration committed by inserting his fingers into M.V.'s vagina), defense counsel argued that no testimony established that defendant committed that act. The court denied the defense's motion.

¶ 21 The defense presented the testimony of defendant and one other witness. Defendant testified that on the day in question, he lived in the basement at 15617 South Union. He attended the party and drank "some beers." At midnight or 1 a.m., defendant was in the garage and cut his hand on a door lock. Hernandez told defendant to go wash his hand and as he went to the residence, he saw M.V. crying near the stairs, saying she wanted her mother.

¶ 22 Defendant testified he carried M.V. upstairs and she was bloodied by the cut on his hand. Defendant took her to her room and laid her on the bed. He said the child "had a lot of blood on

her hands from what I had," and he cleaned her and covered her up with a sheet. Defendant said he closed the door when he left the bedroom and returned to his apartment. Defendant denied removing the child's underwear.

¶ 23 Defendant said Hernandez was drunk the night of the party. When asked if he ever took care of her children, defendant responded he had "always taken care of them." Defendant said after he put M.V. in her room and returned to his apartment, he did not return to Hernandez's residence that night. He acknowledged arriving home at about 8 p.m. on the night of the party and eating in Hernandez's apartment at 9 or 10 p.m. but he denied striking Hernandez on her rear.

¶ 24 On cross-examination, defendant said he was known by the nickname of Burrow. He acknowledged his blood was found on the child's skirt, bedspread and underpants. Defendant said he spoke to police on July 21 and told police he was drunk and did not remember anything. However, defendant stated on redirect examination he told a Detective Escalante that he carried the girl up the stairs during the party.

¶ 25 The defense also called Detective Manuel Escalante, who testified he spoke to Hernandez at the police station on July 19. He did not recall if the investigation revealed the location of the child's underwear. The detective said no photos were taken of the bedroom or any other part of the residence and that he did not go to the residence.

¶ 26 The State called Escalante as a rebuttal witness. The detective interviewed defendant at the police station on July 21 after defendant signed a waiver of his *Miranda* rights. During that interview, defendant did not tell Escalante that he carried M.V. upstairs and put her in her bed. The detective also stated that despite being asked directly, defendant did not provide specific details about how his blood got onto the child's clothing.

¶ 27 In closing argument, the prosecution asserted that, according to M.V.'s testimony, defendant touched her vagina many times and the child's account was corroborated by her

mother's testimony that the child said "Burrow" had touched her vagina. The prosecutor noted the blood on defendant's hand and on the child's clothing and contended that "[t]here was penetration, under the laws of the State of Illinois." In the State's rebuttal closing argument, the prosecutor noted the report of nurse Healy as to the redness in the interior of the child's labia majora and argued the redness occurred because defendant rubbed her vagina.

¶ 28 Finding defendant guilty on all counts, the trial court stated:

> "All the charges are basically, predatory criminal sexual assault of a child. The elements of that are contact between an adult, Arturo Perez, had his hand in [M.V.'s] vagina, and that [M.V.] was under the age of 13. * * * So with that, with each one of the charges comes down to, whether or not it was any sexual penetration to [M.V.'s] vagina, as related to the predatory criminal sexual assault, and also as to the four charges dealing with the criminal sexual assault."

¶ 29 The court reviewed the trial testimony and concluded the State had proved "all of the charges," finding defendant guilty on all six counts.

¶ 30 The defense filed a motion for a new trial. At the hearing on the motion, defense counsel asserted, *inter alia*, that the evidence was consistent with contact to the child's vagina "without any real penetration." The court stated that the redness noted in the nurse's report "could have resulted from many different things," including penetration. The court merged the six counts into a single conviction on count 2, which charged the predatory criminal sexual assault of a child by defendant's inserting his fingers into M.V.'s vagina.

¶ 31 After hearing evidence in aggravation and mitigation of defendant's sentence, the trial court sentenced defendant to 25 years in prison. The court denied defendant's motion to reconsider his sentence.

¶ 32 On appeal, defendant contends the State did not prove beyond a reasonable doubt that he committed an act of sexual penetration against M.V., as required for predatory criminal sexual assault as charged. Where, as here, a defendant challenges the sufficiency of the evidence, it is the task of this reviewing court to consider whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ward*, 215 Ill. 2d 317, 322 (2005). A conviction will be reversed only where the evidence is so unreasonable, improbable or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 33 A defendant commits predatory criminal sexual assault of a child if the defendant was 17 years of age or older and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2008). Sexual penetration is defined, in pertinent part, as "any intrusion, however slight, of any part of the body of one person [] into the sex organ or anus of another person." 720 ILCS 5/12-12(f) (West 2008). In the instant case, count 2 of the indictment charged defendant with committing sexual penetration by inserting his fingers into M.V.'s vagina.

¶ 34 Defendant contends the testimony did not establish that he committed penetration by intrusion as described in the indictment; rather, he asserts the testimony and physical evidence merely established that he touched or rubbed the child's vagina. Defendant points out the Illinois Supreme Court's holding in *People v. Maggette*, 195 Ill. 2d 336, 352 (2001), that a defendant's act of touching or rubbing a victim's sex organ with a hand or finger does not meet the intrusion definition of sexual penetration. The State does not dispute that tenet but contends that here, in

addition to the child's account that defendant touched her vagina, her mother testified the child reported to her that defendant touched her "in her vagina." The State also emphasizes the nurse's physical examination of M.V., which noted redness to the inner labia majora of the child's vagina.

¶ 35 We first address defendant's response to the State's reliance on the medical report. Defendant asserts the redness to the child's vagina as noted in the report of the nurse, who examined M.V. within 24 hours of the described incident, does not establish penetration and that the State did not present evidence that the redness was caused by defendant's alleged assault.

¶ 36 Defendant cites decisions from other jurisdictions that redness to the labia majora is not necessarily a result of sexual assault. However, defendant concedes that Illinois appellate courts have all concluded that the labia majora are sex organs for purposes of the Illinois sexual penetration statute. In discussing the definition of sexual penetration at issue here, this court has held the female sex organ is not limited to the vagina but also includes the labia majora and labia minora, which are the outer and inner folds of skin of the external genital organ. *People v. W.T.*, 255 Ill. App. 3d 335, 347 (1994); see also *People v. Ikpoh*, 242 Ill. App. 3d 365, 381-83 (1993).

¶ 37 Furthermore, this court has rejected the assertion that vaginal penetration is needed to constitute sexual penetration. In *W.T.*, the appellate court held that under the "sexual penetration" definition, the State only needed to show "any intrusion, however slight" to establish penetration. *W.T.*, 255 Ill. App. 3d at 347 (concluding that defendant's rubbing the head of his penis against the victim's labia minora or labia majora constituted penetration of the vagina and therefore constituted sexual penetration under the statute). Under that precedent, the evidence of redness to M.V.'s inner labia majora is sufficient to establish sexual penetration.

¶ 38 Defendant further contends the State did not prove his alleged actions caused the redness. It is the task of the trier of fact to determine witness credibility, weigh testimony and draw

reasonable inferences from the evidence, and it is not the function of this court to retry the defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court also must construe all reasonable inferences in favor of the prosecution. *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 39 Here, M.V., whom the trial court deemed competent to testify, recounted that defendant woke her up in her bed, told her to keep quiet, and touched her vagina. Hernandez testified that her daughter told her defendant took off her underwear and referred to defendant by his nickname. On cross-examination, defense counsel elicited evidence that the child told her mother she was touched "in her vagina." Defendant's DNA was found on the child's underwear and bedspread. In contrast, defendant testified he carried M.V. to her bed and left the room to explain how his blood came to be on her clothing and bedding. Defendant also attempted to discredit the testimony of M.V.'s mother by testifying she was drunk the night of the party.

¶ 40 The sufficiency of the prosecution's evidence that defendant committed the charged conduct was a question of fact for the judge, who was the finder of fact in this bench trial to resolve in light of all of the evidence presented, including the testimony of M.V. and her mother as well as defendant. See *People v. Smith*, 177 Ill. 2d 53, 73 (1997). The conclusions of the fact finder regarding credibility and the resolution of disputed questions of fact are entitled to deference on review. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Moreover, even when a defendant offers a version of events that differed from that testified to by the State's witnesses, the trier of fact is not required to accept a defendant's version of the facts that is compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007), citing *People v. Collins*, 106 Ill. 2d 237, 261 (1985). We find the evidence, considered in the light most favorable to the State, supports defendant's conviction.

¶ 41 Defendant next contends that Hernandez's testimony that M.V. told her defendant touched her "in her vagina" was not admissible as substantive evidence that he committed an act

of sexual penetration. Defendant challenges the State's position that M.V.'s statements to her mother were admissible as substantive evidence of the physical contact under section 115-10 of the Code of Criminal Procedure (725 ILCS 5/115-10 (West 2008)). He argues the trial court did not hold a pre-trial hearing to consider the reliability of the child's statements.

¶ 42 Section 115-10 provides an exception to the hearsay rule and permits testimony regarding out-of-court statements by victims of sexual offenses who are under 13 years of age. 725 ILCS 5/115-10 (West 2008). Such a statement may be admissible if: (1) the trial court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statements provide sufficient safeguards of reliability, and (2) the child either (a) testifies at the proceeding or (b) is unavailable as a witness, and there is corroborative evidence of the subject of the hearsay statement. *Id*. When the trial court conducts a section 115-10 hearing, the court examines the totality of the circumstances surrounding the hearsay statements, including: (1) the child's spontaneity and consistent repetition of the incident; (2) the child's mental state; (3) use of terminology unexpected of a child of similar age, and (4) the lack of motive to fabricate. *People v. Lara*, 2011 IL App (4th) 080983-B (and cases cited therein). As defendant notes, even though the statute refers to the trial court's findings "outside the presence of the jury," section 115-10 is nevertheless applicable to bench trials, as occurred here. See, *e.g.*, *People v. Roy*, 201 Ill. App. 3d 166, 183 (1990).

¶ 43 Though defendant faults the State for failing to request a pre-trial hearing pursuant to section 115-10 as to the admissibility of the child's outcry statements to her mother, the State did not seek the introduction of that evidence. Rather, defense counsel, in cross-examining Hernandez, introduced the evidence that M.V. told her defendant touched her "in her vagina." Indeed, defendant poses as an alternative argument on appeal that should we find Hernandez's account was properly admitted, we also should find his attorney was ineffective for eliciting that

testimony. Defendant contends the element of penetration could not have been proven without Hernandez's testimony of the child's statements.

¶ 44 Claims of the ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), under which a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not consider the quality of the attorney's performance. *Id.* at 697. In evaluating the prejudice prong, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

¶ 45 Defendant cannot show the result of his trial would have been different without Hernandez's testimony of M.V.'s statements. M.V. testified that defendant woke her up in her bed and told her to keep quiet, and then touched her on her vagina "a lot." M.V. also contradicted defendant's testimony that he picked her up and carried her to bed, which is how defendant explained the presence of his blood on the child's clothing, including her underwear, and her bedspread. In addition, an examination of the child revealed redness to the inner labia majora, which establishes sexual penetration by intrusion. Given that evidence, the result of defendant's trial would not have been different without Hernandez's testimony.

¶ 46 In summary, considering the evidence in the light most favorable to the prosecution, the State established that defendant committed the act of predatory criminal sexual assault of a child. The evidence showed that the DNA found on the child's underwear matched that of both defendant and the child. The evidence also established that defendant committed an act of sexual penetration by touching M.V. inside her vagina, resulting in redness that was noted during a

physical examination, and meeting the statutory definition of sexual penetration by intrusion. We also hold that defense counsel did not provide ineffective assistance by eliciting testimony from M.V.'s mother that the child reported defendant touched her "in her vagina," where the result of defendant's trial would not have been different absent that testimony.

¶ 47 Accordingly, the judgment of the trial court is affirmed.

¶ 48 Affirmed.